VIRGINIA IN THE SUPREME COURT.

MY question was:

"What is the meaning of the late decision of the Supreme Court in the Habeas Corpus cases from Virginia? Give me some idea of its historic relations as a Constitutional question."

The question is a very large one, but I will condense the answer so as not to be prolix, and yet clearly present the subject to the popular mind.

It is a fundamental principle of national law that no government can be enforced by suit to do what it does not will to do; unless it has by law consented to be sued. Thus the British Government can only be sued through a petition to the Crown for leave to present a claim against it, and then it is regarded as a matter of grace and not of right. For how can a court, which is the creature of a sovereign, compel the creator to do what he does not will to do? The power the court would use to compel obedience is that of the sovereign it would enforce, and thus, in the last analysis, it would be a case of self-compulsion.

But back of this, there are reasons of public policy, which make any external force improper and of evil tendency. The safety of a people may require all its resources to be devoted to that end, and the subjection of its means to the claims of every creditor or claimant might sacrifice the public good to private interests—the Commonwealth to the claim of an individual.

Under the Federal Constitution the United States, representing the combined sovereignties of the States of the Union, cannot be sued but by their consent; and hence all claims were originally proferred to Congress, and it was only thirty odd years ago that the Court of Claims was established by law, in which suitors might prosecute claims against the United States. But even under that law, the judgment is of no avail until Congress in good faith ap-

propriates money to pay it, when the Court has rendered it. To enforce the judgment by an execution against the property of the United States might divest the Government of the very buildings erected for the Congress and the Executive of the Union.

The same reasons obtain in respect to any one of the States. Salus populi, suprema lex is the maxim which subordinates private claims to the public and common weal; and, if it be set aside, as to a State or the union of States, the result might be disastrous, and would always be impolitic and injurious to the welfare of the public.

When the Federal Constitution was adopted, the judicial power of the United States was extended to controversies to which the United States shall be a party—but it was always construed to mean only such controversies, when the United States were plaintiffs, and not when they were defendants; to suits brought by, and not to those brought against, them.

The same clause gave judicial power to suits between a State and citizens of another State, or citizens and subjects of a foreign State. And this was held by Alexander Hamilton in the eighty-first number of the *Federalist,* written before the adoption of the Constitution, and as an inducement to the people to adopt it, to exclude the idea of any suit being brought *against* a State by citizens of another State, or by those of a foreign State.

Singular to say, however, "for the best laid schemes of mice and men aft gang aglee," the Constitution was not more than two years old when the Supreme Court of the United States entertained suits by citizens of other States, in and out of the Union, against several of the States. Massachusetts, New York, Maryland, Virginia, South Carolina and Georgia, were sued by their creditors and other claimants; and after a while, on the 18th of February, 1793, a judgment for a debt was rendered in the Supreme Court in favor of Mr. Chisholm against the State of Georgia.

This judgment excited great feeling, and created alarm in all the States. On the 20th of February, 1793 (two days after the judgment in Chisholm against Georgia), an amendment to the Constitution was proposed in the House of Representatives, declaring that "the judicial power of the United States shall not extend to any suit brought against a State" by any citizens of a State in the Union, or of a foreign State. But Congress ad-

journed in ten days (it was proposed in the short session), and the proposition went over until 1794.

Both Houses of Congress adopted the amendment proposed with a significant modification. Had it passed as first proposed, it would have only operated on future cases. But the modification was in the new words, which made it read as it now stands in the Constitution as the 11th amendment:

"The judicial power of the United States shall not *be construed* to extend," etc.

In other words, the States in adopting this amendment declared to the Supreme Court itself, virtually, that you have construed the original Constitution improperly, and shall not so construe it again. You must hereafter construe it as meaning that no State can be sued in a Federal Court by any citizen, but the State may sue a citizen in that Court. She can sue, but shall not be sued by any such citizen.

John Hancock, President of the Congress of Independence, and signer of its declaration, was Governor of Massachusetts at the time; and Light Horse Harry Lee, grandfather of the present Governor of Virginia, was then Governor of Virginia. They corresponded on the subject. Governor Lee went to Philadelphia, where Congress was in session, to urge the adoption of the amendment, and Massachusetts, the land of the Pilgrims, and Virginia, the land of the Cavaliers, joined hands in saving to every State immunity from suit at the instance of any citizen of any other State. Nobody then ever dreamed that a State could be sued by its own citizens—nor did the Supreme Court so hold.

The amendment was adopted by the States with great unanimity.

As soon as its adoption was proclaimed, the Supreme Court dismissed all suits previously brought and still pending on its docket, and thenceforth the liability of a State on its obligations rested on public faith and the sovereign will of the State itself. The basis of public credit of the United States, and of every separate State, is the same—the sovereign will of the Union, the sovereign will of the State.

But a phase of this great question was presented then.

Both of these governments, that of the Union and that of a State, as is the government of any country, is a metaphysical being which can only act through physical agencies. It can only

collect its revenues by tax-gatherers, and hold its treasury by officials appointed for the purpose. It can take and hold property of all kinds, but only through the medium of persons clothed with authority to receive and to keep it.

It is obvious that these persons who are agents of government have thus a double relation to men and things around them. In one they are men with personal rights and personal responsibilities. In the other they are representatives of government, with official rights and official immunity from responsibility. What is done in the one relation they are personally liable for; for what is done in the other they are only liable representatively.

After long debate in the Courts, and many decisions in the last decade or more, more definite conclusions have been reached upon this distinction between personal and official action, and liability therefor. A discussion of the different cases would be inappropriate. But Virginia is the scene of two cases which illustrate the distinction on which a judicial rest has been reached in the forensic discussion which has been carried on in the Supreme Court for many years.

During the late Civil War, Arlington, the estate left by G. W. P. Custis, the grandson of the wife of George Washington, to his daughter Mary Custis Lee, the wife of Gen. Robert E. Lee, for her life, with remainder to Gen. G. W. Custis Lee, of Lexington, Va., in fee simple, was assessed by the officers of the United States with a direct tax of about $90. There was ample personal effects on the premises to pay it, but the official of the Government choose to offer the estate for sale, for default in paying the tax. The life tenant, and the remainder man, and the husband of the life tenant were in the Confederate States, with the blazing line of battle between them and the tax gatherer. A friend of the family was ready to tender and pay, and the hearsay evidence is, did tender the full tax. But the tax commissioners said the tax must be paid in person by Gen. Robert E. Lee, the husband of the owner for life, or by herself, or the patrimonial home would be sold to pay the tax.

It was sold for $30,000 and more, and the President authorized it to be bought in for the government for a military cemetery.

Under official orders, certain persons, officers of the United States, took and held Arlington—and claimed to hold it for the United States.

Mrs. Lee having died, General Custis Lee, the remainder man, petitioned Congress to pay him for the estate. Congress failed to act, and General Lee brought an action of ejectment against the *persons* in possession. These persons claimed, and the Attorney General of the United States claimed, that the possession was in the *persons* sued as representing the United States, and that the suit was in reality a suit against the United States, and could not therefore be maintained.

The case came to the Supreme Court, and it was decided in substance, that the persons, who were in actual possession and were actually sued, could not claim immunity from suit under the sovereign claim of the Government of the United States, unless they were legally in possession by the legal authority of the United States, and that as the whole procedure by which Arlington was sold for taxes, when the tax was ready to be paid, and was refused to be received, was illegal and unconstitutional, the United States had no title to hold it and could not, therefore, authorize anybody to hold it for them, and that, therefore, the persons in possession could not claim to represent the United States, but were in possession as personal trespassers on the legal rights of the plaintiff, who, therefore, had judgment for the estate affirmed. The personal right of the citizen to his property could not be taken away by a person in the name of a government, unless the Government could legally and constitutionally authorize it, and the person so acting could not claim immunity from suit by the citizen, upon the ground that the government could not be sued, when the Government had no legal right to the property at all. The right of the citizen was protected against the wrong of a person, who claimed falsely to act in behalf of the Government, which *could* not legally authorize the act, and therefore in legal contemplation did not authorize it.

After this decision, the Legislature of Virginia passed a law directing its collectors of taxes to refuse coupons clipped from bonds of Virginia, when tendered by the tax payer, on which coupon was the agreement of the State, under the law of 1870, that these coupons should be receivable for all taxes. This refusal the Supreme Court had repeatedly decided was an impairment of the obligation of the contract of the State evidenced by the coupon.

The law of Virginia, nevertheless, directed the tax collector to

refuse the coupons, and to levy upon and sell the property of the tax payer in order to the payment of the tax.

This the tax gatherer did, and a number of suits was the result—some for damages for the sale, some injunctions to prevent a threatened sale, and others for the recovery of the property levied upon and not sold.

These cases at last came under review in the Supreme Court in 1885, and were decided adversely to the claims of Virginia.

The Court held that the act of the tax collector in levying, taking or threatening to take the property of the citizen tax payer, who had tendered coupons in the payment of his taxes, was unlawful, and that he could not claim immunity from his liability for the personal wrong by alleging that he had acted by authority of the State, because the State could not be held to have given an unlawful and unconstitutional authority to do such an act, and the tax collector was held *personally* liable, and not *officially* exempt from liability by reason of an alleged authority from the State, which the State was constitutionally prohibited from delegating. The man was liable for his wrong because the State could not give him its immunity by an unconstitutional delegation of authority.

But Virginia claimed the right to require the authentication of the genuineness of the coupons tendered by other means than by their inspection by her tax collectors, who were not experts in the business.

Accordingly, to avoid the suits brought by tax payers for wrongful levy after a tender of coupons, Virginia, in May, 1887, passed a law requiring her collectors not to receive the coupons, but to report the names of those who tendered them to the law officers of the Commonwealth, whom she authorized to sue all such persons for their taxes due to her, and permitting them to plead their tender of coupons, and prove the tender of genuine coupons under their plea, bringing their coupons so tendered into Court, to be delivered up to the State upon proof of their genuineness.

This law thus assured the State against spurious coupons, and against a feigned tender of them ; while it recognized the right of the tax payer to tender genuine coupons in discharge of his taxes, as the Supreme Court had decided.

A syndicate of owners of Virginia coupons then filed a

bill of injunction in the United States Court, praying the Court to enjoin the Attorney General and all the attorneys for the Commonwealth of Virginia from bringing any suits under that law in the name of Virginia. The injunction was granted. The Attorney General and some of the Commonwealth's attorneys disobeyed the injunction, and thereupon Judge Bend ordered them to be fined and imprisoned until they paid the fines imposed, and until they dismissed all the suits brought by them for Virginia against her delinquent tax payers, and in one case, until the attorney for the Commonwealth entered of record that a judgment recovered by Virginia against a tax payer upon a suit brought by him was satisfied.

The parties were all imprisoned. They prayed severally a writ of *habeas corpus* from the Supreme Court of the United States, principally on the ground that the whole proceeding was null and void, because, in fact, the injunction bill was a suit against Virginia, and without jurisdiction under the Eleventh Amendment of the Constitution of the United States.

These great cases were argued on the 14th and 15th of November, and the Court decided them on the 5th of December last.

Seven judges concurred in the judgment, with one dissentient.

The judgment was full, able and elaborate, and discharged all the prisoners, on the distinct ground that the injunction suit was in reality a suit against Virginia, that all its proceedings were wholly null and void and contrary to the Eleventh Amendment of the Constitution, and that the law of Virginia directing suits to be brought was not in violation of the Constitution.

Thus this great decision has made a settlement of this important question, and has established the immunity of the States from all suits by citizens of other States, or of foreign States, whether directly or indirectly by suing their officers, when the effect is to coerce State will through judicial procedure.

This case will be a leading case and a judicial landmark for all time to come, in protecting the rights of the States from the coercive control of Federal Courts, and in conserving their autonomy in the management and direction of their own internal affairs.

J. RANDOLPH TUCKER.